

**PROFESSIONAL FIDUCIARIES BUREAU
DEPARTMENT OF CONSUMER AFFAIRS**

INITIAL STATEMENT OF REASONS

Hearing Date: November 18, 2008

Subject Matter of Proposed Regulations: Reporting, citation and fine, enforcement, code of ethics, and cleanup.

(1) Section(s) Affected: 4422, 4440, 4470, 4482, 4544, 4600, 4602, 4604, 4606, 4608, 4610, 4620, 4622, and 4624

Specific Purpose of each adoption, amendment, or repeal:

This regulatory action amends Section 4422 of Article 2 and Section 4440 of Article 3, and adopts subdivision (f) of Section 4470 and subdivision (g) of 4482 of Article 4, Section 4544 of Article 9, Sections 4600, 4602, 4604, 4606, 4608, and 4610 of Article 10, and Sections 4620, 4622 and 4624 of Article 11 of Division 41 of Title 16 of the California Code of Regulations. Specifically, this regulatory action:

Article 2. Application and Licensure

Amends Section 4422.

This amendment makes a technical cleanup.

Article 3. Prelicensing and Continuing Education

Amends Section 4440.

This amendment changes the date for qualifying prelicensing education credit for licensure as cleanup.

Article 4. Code of Ethics

Adopts subdivision (f) of Section 4470.

This section relates to the licensee's duties in providing client services.

Adopts subdivision (g) of Section 4482.

This section relates to licensee's duties in incurring expenses on behalf of the client.

Article 9. Reporting Requirements

Adopts Section 4544.

This section specifies the ongoing reporting duties for licensure.

Article 10. Citations

Adopts Section 4600.

This section establishes the Bureau's authority to issue citations and establishes a citation format.

Adopts Section 4602.

This section defines the maximum administrative fine amount that can be assessed on a citation issued by the Bureau.

Adopts Section 4604.

This section specifies factors to consider when determining the amount of an administrative fine.

Adopts Section 4606.

This section would establish the process for contesting a citation and holding an informal conference.

Adopts Section 4608.

This section authorizes the Bureau to take administrative action against a licensee when they fail to comply with a citation.

Adopts Section 4610.

This section establishes order of abatement procedures.

Article 11. Enforcement

Adopts Section 4620.

This section specifies substantially related criteria for license suspension or revocation.

Adopts Section 4622.

This section specifies rehabilitation criteria for license suspension or revocation.

Adopts Section 4624.

This section specifies disciplinary guidelines for enforcement actions.

Factual Basis/Rationale

Senate Bill 1550 (Figueroa, Chapter 491, Stats. 2006) created the Professional Fiduciaries Bureau (Bureau) under the Department of Consumer Affairs to license and regulate professional fiduciaries under the Professional Fiduciaries Act (Act) (Chapter 6 (commencing with Section 6500) of Division 3 of the Business and Professions Code).

In 2007, the Act was amended by Senate Bill 1047 (Committee on Business, Professionals, and Economic Development, Chapter 354, Stats. 2007) to extend the licensing deadline to January 1, 2009, but, it still prohibits a court from appointing a person on or after July 1, 2008 to carry out the duties of a professional fiduciary unless the person holds a valid license issued by the Bureau.

Licensing for professional fiduciaries is a new mandate. The proposed regulations are necessary to establish the Bureau's program for enforcement and reporting. Furthermore, the regulations address potential ethical issues with licensees providing services for clients and incurring expenses in the management of clients' estates to ensure choices are made that are appropriate and reasonable based upon the needs of the clients and the interests of the estates and that the expenses are reasonable for the services provided. Finally, the proposal makes non-substantive technical changes to existing language.

Although the licensing program is new the reporting mandates are not. Under the law prior to July 1, 2008, California Probate Code Section 2850 et. seq. required private fiduciaries register with the California Department of Justice. In addition, Probate Code Section 2342 required all private fiduciaries file annual statements with the court clerks. These provisions sunsetted June 30, 2008 at the same time the Bureau started licensing.

Under the Act, fiduciaries must report information on their licensing application and annual statements to the Bureau that is similar to what fiduciaries reported under the previous reporting mandates to the Department of Justice and to the court clerks. Disclosure of information collected from applicants and licensees is a fundamental design of the licensing program. The Act requires some of the information be provided to the public and requires specific confidential information be available to the courts only. This provides the public and the courts with pertinent information to assist them when making decisions regarding the services of professional fiduciaries. The collection and disclosure of professional fiduciary information as required by law protects the public health, safety and welfare.

Furthermore, the proposal is necessary to implement the Bureau's enforcement program as mandated by law and includes specific factors for issuing citations and fines and adopts criteria to determine whether there is a substantial relationship between the crime and the licensee's activities as a professional fiduciary and it also adopts criteria for rehabilitation.

The proposed regulations adopts specific factors for the Bureau's enforcement program to consider when issuing citations and fines as authorized generally by Sections 125.9 and 148 of the Business and Professions Code and specifically pursuant to Sections 6580 and 6583 of the Act, for any violation of the Act, the Professional Fiduciaries Code of Ethics, or any regulation adopted under the Act for which the Bureau has authority to issue a citation.

Sections 6583 and 6584 of the Business and Professions Code provide for enforcement actions for which the Bureau may issue citations and fines for violations of the Act as specified for the following causes:

- Any felony or any misdemeanor conviction, if the misdemeanor is substantially related to the functions and duties of a professional fiduciary (Business and Professions Code Section 6584(a)).
- Failure to notify the Bureau of a conviction as required by paragraph (10) of subdivision (a) of Section 6561 (Business and Professions Code Section 6584(b)).
- Fraud, dishonesty, corruption, willful violation of duty, gross negligence or incompetence in practice, or unprofessional conduct in, or related to, the practice of a professional fiduciary. For purposes of this section, unprofessional conduct includes, but is not limited to, acts contrary to professional standards concerning any provision of law substantially related to the duties of a professional fiduciary (Business and Professions Code Section 6584(d)).
- Failure to comply with or to pay a monetary sanction imposed by, a court for failure to provide timely reports (Business and Professions Code Section 6584(e)).
- Failure to pay a civil penalty relating to the licensee's professional fiduciary duties (Business and Professions Code Section 6584(f)).
- The revocation of, suspension of, or other disciplinary action against, any other professional license by the State of California or by another state (Business and Professions Code Section 6584(g)).
- Violation of Chapter 6 of Division 3 of the Business and Professions Code or of the applicable provisions of Division 4 (commencing with Section 1400), Division 4.5 (commencing with Section 4000), Division 4.7 (commencing with Section 4600), or Division 5 (commencing with Section 5000) of the Probate Code or of any of the statutes, rules, or regulations pertaining to duties or functions of a professional fiduciary (Business and Professions Code Section 6584(h)).

As a general matter, citations are issued for violations of sufficient severity to warrant enforcement action by the Bureau, but which are not severe enough to warrant disciplinary action, or in the case of an unlicensed practice where the Bureau does not have the authority to pursue disciplinary action. Citation factors are needed to provide the Bureau with the authority and flexibility to appropriately manage individual violations. Used appropriately, the citation will have a deterrent effect and provide for consumer protection.

An administrative fine amount for inspections or investigations are determined by considering specific factors and may not exceed \$5,000, and only under specific circumstances (listed below), can the fine amount be in excess of \$2,500 (Section 125.9(b)(3) of the Business and Professions Code). This allows for the imposition of an enhanced fine for particularly egregious violations.

The proposed citation factors shall be considered when determining the amount of any citation:

- The good or bad faith exhibited by the cited person (Section 4604(a)(1) of the California Code of Regulations).
- The nature and severity of the violation (Section 4604(a)(2) of the California Code of Regulations).
- Evidence that the violation was willful or not (Section 4604(a)(3) of the California Code of Regulations).

- History of previous violations (Section 4604(a)(4) of the California Code of Regulations).
- The extent to which the cited person has cooperated with the Bureau (Section 4604(a)(1) of the California Code of Regulations).
- The extent to which the cited person has mitigated or attempted to mitigate any damage or injury caused by his or her violation (Section 4604(a)(6) of the California Code of Regulations).
- Extenuating circumstances as justice may require (Section 4604(a)(1) of the California Code of Regulations).

These factors are important in that they allow flexibility for the Bureau in managing enforcement for a variety of violations by different types of fiduciary acting in different roles with responsibilities based upon the specific needs of the consumers and governing authorities, whether the authority is derived from written agreements, such as trusts and durable powers of attorney, or by court authority for specific conservatorships, guardianships, and special needs trusts. Fiduciary cases are complex with varying issues involving a spectrum of possible interested parties, including the courts, court investigators, probate attorneys, family members, health care providers, etc... The factor, "Extenuating circumstances as justice requires" allows for unique facts and specific circumstances to be considered for each violation or violations so that the Bureau can evaluate each case individually taking into account matters of fundamental fairness.

For the issuance of a citation in excess of \$2,500 the Bureau must determine at least one of the following:

- The violation presents an immediate threat to the health, safety, or welfare of another person (Section 4604(b)(1) of the California Code of Regulations).
- There are multiple violations of the Act or it's regulations that demonstrate a willful disregard of the law (Section 4604(b)(2) of the California Code of Regulations).
- The licensee has a history of two or more prior citations for the same or similar violation (Section 4604(b)(3) of the California Code of Regulations).
- The violation involves unlicensed activity (Section 4604(b)(4) of the California Code of Regulations).
- The violation is perpetrated against a minor, or an elder or dependent adult, or a person with a physical or mental disability as defined in Section 12926 of the Government Code (Section 4604(b)(5) of the California Code of Regulations).

The existence of any of these factors poses a greater threat of consumer harm thus justifying a higher penalty. For example, a higher penalty would be appropriate if there was an immediate threat to the health, safety, or welfare of another person, if the licensee repeatedly violates or disregards the law, if the licensee continues to violate the same or a similar provision of law, or if the violation involves a class of consumers that are particularly vulnerable, including children, elder or dependent adults, or a person with a physical or mental disability. These vulnerable consumers may not even recognize or may experience difficulties reporting any abuse or breach due to their state; yet, professional fiduciaries are entrusted to handle client matters involving possible life threatening decisions or varying financial solvency risks so the consumer deserves extra safeguards.

For unlicensed activity, it is important for the Bureau to have authority to issue a citation higher than \$2,500 because these individuals may not have the skills necessary to be fiduciaries and their actions could endanger the health and safety of the consumer, or these individuals may be blatantly disregarding the licensing mandates, which raises not only serious ethical issues, but also competency issues. Unlicensed activity could pose serious risks to the consumer, and unfortunately, enforcement remedies are limited for both the Bureau and the consumer. A higher penalty will have a deterrent effect and provide for protection against unlicensed practitioners.

The proposed regulations also adopt criteria to aid in determining whether a crime or act is substantially related to the qualifications, functions, or duties of a license to justify license suspension or revocation (Section 4620 of the California Code of Regulations). The proposal contains some examples of substantially related crimes and acts including crimes or acts involving fiscal dishonesty or breach of fiduciary responsibilities of any kind. Such crime or acts can present significant risks to consumers relative to financial or health matters.

The substantially related proposal is consistent with Section 6584 of the Business and Professions Code. For example, Section 6584(d) authorizes disciplinary actions when the act or crime involves fraud, dishonesty, corruption, willful violation of duty, gross negligence or incompetence in practice, or unprofessional conduct in, or related to, the practice of a professional fiduciary and when the licensee fails to comply with fiduciary duties such as the payment of a monetary fine (Section 6584(e) of the Business and Professions Code), the payment of a civil penalty (Business and Professions Code Section 6584(f)), or the licensee was convicted or there was a disciplinary action against another professional license, or the licensee failed to comply with specified fiduciary duties (Business and Professions Code Section 6584(g)).

Finally, the regulations propose criteria for rehabilitation of a licensee and factors to evaluate a licensee's present eligibility for a license as set forth in Section 4622 of the California Code of Regulations. The following criteria shall be considered if the license was suspended or revoked for a substantially related crime or act:

- The nature and severity of the act(s) or crime(s) (Section 4622(a) of the California Code of Regulations).
- Evidence of any act(s) or crime(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for suspension or revocation which also could be considered grounds for suspension or revocation under Section 6584 of the Business and Professions Code (Section 4622(b) of the California Code of Regulations).
- The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (a) or (b) (Section 4622(c) of the California Code of Regulations).
- The extent to which the licensee has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee (Section 4622(d) of the California Code of Regulations).

- Evidence, if any, of rehabilitation submitted by the licensee (Section 4622(e) of the California Code of Regulations).

These factors must be considered in light of the acts or crimes to provide for consumer protection. This will ensure that a person who commits a minor offense is treated differently than a person who commits a more serious offense. Also, compliance with the law subsequent to the disciplinary action will be considered favorably, and; an act or crime that occurred closer in time will be considered more relevant on the issue than an act or crime for which more time has lapsed. Finally, the Bureau will take into consideration any evidence submitted by the licensee demonstrating rehabilitation as proof of rehabilitation.

Since the licensing program is still in the early stages of development, there currently are no regulations for substantial relationship or for rehabilitation criteria for enforcement and disciplinary actions. However, the Bureau does currently have regulations for substantial relationship and rehabilitation for licensing and denial that are essentially identical. The proposal is needed to establish the substantial relationship and the rehabilitation criteria for professional fiduciaries to inform applicants, licensees, the courts, consumers, and interested parties of the relevant criteria for enforcement and disciplinary action. This will provide for the protection of the public health, safety, and welfare.

Business Impact

This regulation will not have a significant adverse economic impact on businesses.

Specific Technologies or Equipment

This regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

No reasonable alternative to the regulation would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

It is necessary for the Bureau to adopt the reporting requirements and enforcement procedures to enforce the Bureau's laws as mandated by the Professional Fiduciaries Act.